UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CLARICE K. ATHERHOLT,
(Petitioner)

DANA CORP.,
(Employer)

Case No. 8-RD-1976

and

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO ("UAW")
(Union)

ALAN P. KRUG AND JEFFREY A. SAMPLE
(Petitioners)

Cases Nos. 6-RD-1518 and 6-RD-1519

METALDYNE CORPORATION (METALDYNE SINTERED SINTERED PRODUCTS)
(Employer)

INTERNATIONAL UNION, UAW,
(Union)

REPLY BRIEF OF DANA CORPORATION

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ARGUMENT

In the twenty-eight (28) briefs filed with the Board, the status of the voluntary recognition bar and related issues have been explored in detail. Accordingly, Dana will not waste the Board's time with a detailed recitation of its arguments and responses to opposing parties. But it is Dana and its employees that are directly affected by the Board's decision and so a few points should be emphasized.

1. As set forth in Dana's Opening Brief and numerous other briefs filed with the Board, voluntary recognition, through card checks and other means, is authorized by the express language of the Act. The simple question before the Board is given that statutory authorization, will it allow the collective bargaining process a reasonable period to work; or, will it let that process be immediately thrown into disarray by the filing of a decertification petition. Such a possibility will damage the collective bargaining process and thereby the rights of employees who have selected union representation; put inordinate pressure on unions and employers as they bargain a first contract; and likely lead to increased industrial strife. In short, no good can come out of this proposed change in the law.

2. The Right to Work Foundation premises its arguments on the most disingenuous of contentions. It states:

> The NLRB has never investigated the circumstances under which Dana and Metaldyne hand-picked and then recognized the UAW, to determine if rights guaranteed to employees by the NLRA were trampled, or if employees were permitted to make their choices under

'laboratory conditions.' The NLRB simply has no idea of the uncoerced desires of the majority of Dana and Metaldyne employees with regard to UAW representation.

Petitioners' Joint Brief on the Merits at 33. But the lack of an NLRB investigation was the Petitioners' own choice. As set forth in Dana's Opening Brief, the unfair labor practice provisions of the Act provide a wide range of rights and remedies to ensure that employee rights are not trampled, that employees do not endure threats, coercion, harassment, and that employers do not provide unlawful assistance to and recognition of a minority union. See Brief of Dana Corporation at 18-22. Yet no charges were filed in this matter. As they admit: "Clearly Petitioners could have filed unfair labor practice charges, but chose not to." Petitioners' Joint Brief at 37. Their argument that they didn't want to "punish" Dana and the UAW rings hollow. See id. Doubtless, they choose not to file unfair labor practice charges for the simple reason that no unfair labor practices had occurred. The dismissal of the charges would have totally undermined the entire premise of their argument for abolition of the voluntary recognition bar rule. 1/

3. Petitioners argue that Board-conducted elections are the "preferred" method of determining employee wishes. But Congress provided that they are not the only method. Card checks are expeditious and avoid the

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1/ Petitioner Atherholt's declaration is full of unsupported, hearsay, conclusory statements. For example, "The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home." Petitioner Atherholt's Declaration at 2. That is not evidence; it is not even a tender of evidence. And if employees really suffered harassment and coercion, the employee(s), Ms. Atherholt or the Right to Work Foundation could have filed a simple one-page unfair labor practice charge with the Region. That none of them choose to do so belies the arguments presented here.

confrontational electioneering of so many Board elections. And the interest arbitration provisions of the Dana/UAW partnership do not ensure that a collective bargaining agreement is signed before the voluntary recognition bar expires. In fact, interest arbitration procedures only begin after six months. If the parties do reach an agreement within six months, the result is a contract- exactly what a majority of Dana employees sought when they signed authorization cards. If they do not reach a collective bargaining agreement, employees are free to file a decertification petition in which case it should be handled in accordance with settled Board law; that is, the Board will assess whether there has been a reasonable period for bargaining. Dana has no interest in reaching an agreement with the UAW or any other union in order to foreclose employee rights. There is not an iota of evidence otherwise. And the purpose of interest arbitration is not to beat employees out of a decertification petition, but to avoid strikes. Innovative, non-confrontational approaches to labor relations are to be encouraged. Petitioners seem to prefer a model of labor relations that is based upon conflict between unions and employers and not cooperation.

In this regard, as opposed to a Board conducted election where the determination to select a union or not is made only by those voting in the election, a card check process such as the one in this case requires that a majority of all the employees in the bargaining unit ask for union representation before the collective bargaining process commences. Contrary

to the implication of the Petitioners' arguments, Dana employees are not sheep. They are well-paid, responsible workers who have to make important decisions every day in the workplace. Absent evidence to the contrary, there is no reason to believe that when they signed an authorization card, they meant anything other than they wanted the UAW to represent them in collective bargaining negotiations. As the Supreme Court has noted, "we should not act hastily in disregarding congressional judgments that employees can be counted on to take responsibility for their acts." NLRB v. Gissel Packing Co., 395 U.S. 575, 607 (1969).

4. Petitioners' concern that the Board is being "cut" out of the election process because post-election disputes may be decided by neutral arbitrators pursuant to a neutrality agreement rather than by the Board is misplaced. See Petitioners' Joint Brief at 13-16. There is nothing "incongruous" about the Ninth Circuit's decision in Service Employees Int'l Union v. St. Vincent Med. Ctr., 344 F.3d 977 (9th Cir. 2003). There, the parties had agreed to guidelines for election conduct to ensure that employees could decide on union representation free from intimidation and coercion. Id. at 980. Breaches of the guidelines would be resolved through a third party neutral. Id. In compelling arbitration of a claim that those guidelines had been breached over the objections of the employer, the Court of Appeals noted that Board elections are "too often marred by 'bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations,

misrepresentations and distortions.'" Id. at 979 n.2 (quoting Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 58 (1966)). The court's decision was in accord with decades of case law supporting the arbitration of labor disputes.

And, indeed, in another recent case involving the enforcement of a neutrality agreement, the Board stated that it "will enforce [voluntary agreements between employers and unions], including agreements that explicitly address matters involving union representation." Verizon Info. Sys., 335 N.L.R.B. 558, 559 (2001). See also Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 566 (2d Cir. 1993) ("[A]n employer and labor organization are not thereby foreclosed from reaching a private agreement on union recognition. Such a contract, which bypasses Board-conducted elections, provides an alternative method for employees to accept or decline union representation."); Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp., 961 F.2d 1464, 1469 n.8 (9th Cir. 1992) ("The NLRB can and does enforce employers' agreements to waive their rights to the NLRB's regular election and certification procedures and substitute alternative measures."); Kroger Co., 219 N.L.R.B. 388, 389 (1975).

5. The Right to Work Foundation argues that at times unions have sought to obtain neutrality agreements through so-called corporate campaigns characterized by baseless lawsuits, unfavorable publicity and through the use of secondary pressure or hot cargo agreements. Undoubtedly,

at times this has occurred. And if so, the Board can and will take action in circumstances where the Act has been violated. Further, Dana respectfully submits that the Board should use the remedial powers vested in it through Section 10(c) of the Act to abrogate the fruits of such unlawful conduct, such as a neutrality agreement unlawfully obtained. See Fountainview Care Ctr., 317 N.L.R.B. 1286 (1995) (Where an employer unlawfully assisted a union during an authorization card drive in violation of Section 8(a)(2), the Board voided the resulting collective bargaining agreement); Famous Castings Corp., 301 N.L.R.B. 404 (1991) (The Board ordered the parties to cease and desist from giving effect to a recognition agreement and a collective bargaining agreement where the employer provided unlawful assistance to the union during a recognition drive in violation of Section 8(a)(2)). See also Caterair Int'l, 322 N.L.R.B. 64, 64 (1996) ("It is well established that 'the remedial power of the Board is a broad discretionary one, subject to limited judicial review.'") (quoting NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-63 (1969); Silver Bay Local Union No. 962, 215 N.L.R.B. 414, 414 (1974) ("[T]he Board's 'broad discretionary' power in fashioning remedies has been acknowledged by the Supreme Court.") (citing NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 346 (1953)). But the fact that unions may have overstepped the bounds in specific circumstances, by no means is a reason to change the Board's voluntary bar policies and effectively abolish all card check agreements.

6. Petitioners' argument that the Board's voluntary recognition bar policy somehow "repeats the folly" identified in International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961) and Nova Plumbing, Inc. v. NLRB, 330 F.3d 531 (D.C. Cir. 2003), is without merit. See Petitioners' Joint Brief at 20-21. The Ladies Garment case involved the recognition of a demonstrably minority union, indeed a union that had been unlawfully assisted by the employer. See 366 U.S. at 734, 739. Nova Plumbing was the same. In that construction industry case, the Board had given effect to a pre-hire agreement clause stating that based upon a certification by a Certified Public Accounting Firm, the union was recognized as the majority representative of the employer's employees. See 330 F.3d at 535. Therefore, the NLRB held that the employer was required to bargain with the union after the agreement expired. Id. Reversing the Board, the Court held that the Board could not find Section 9(a) status based upon the contract clause alone, especially since there had been no such certification, and, on the contrary, the evidence indicated that the union did not have majority status. Id. at 536-38. The facts here show that the UAW had majority status, and indeed, that status has been certified by an independent Federal Mediation and Conciliation Service Mediator.

7. The distinction made by the NLRB in its Order Granting Review regarding the timing of neutrality/card check agreements in relation to the collection of authorization cards in this case is a distinction that has not been

made in Board jurisprudence. Board law has repeatedly enforced voluntary employer-union agreements to recognize a union upon a showing of majority support via card checks *regardless of the timing* of that agreement—whether before or after the card check occurred. Compare Seattle Mariners, 335 N.L.R.B. 563 (2001) (upholding voluntary recognition where a majority of authorization cards were collected approximately two to three months after the execution of a formal neutrality/card check agreement); and Snow & Sons, 134 N.L.R.B. 709 (1961) (holding that an employer may agree to recognize the union on the basis of a card majority *prior* to initiation of card check procedures), with Rockwell Int'l Corp., 220 N.L.R.B. 1262 (1975) (upholding the validity of voluntary recognition when the employer agreed to recognize the union *after* it was presented with authorization cards from a majority of employees).

Indeed, not only has the Board approved of voluntary recognition arising from neutrality/card check agreements regardless of when they may occur in the organization process, the Board has explicitly approved of the timing of the neutrality/card check agreement that occurred in the instant cases:

> The Board has held that an employer may agree in advance of a card count to recognize a union on the basis of a card majority, and we can perceive of no reason why it may not contract with the union to do so in advance of the time the union has commenced organization.

Kroger Co., 219 N.L.R.B. at 389 (citation omitted). Thus, under established Board precedent, the particular timing of a voluntary recognition agreement

is not a relevant inquiry when determining the validity of voluntary recognition, and in turn, the applicability of the voluntary recognition bar.

Further, neither the Petitioners nor *amici* has provided any reason for this distinction. First, their assumption that a card check agreement providing for the submission of authorization cards to a neutral for verification is not a product of employee desire is without evidentiary support. Often, such agreements are signed while organizing is ongoing as a way to quickly and non-confrontationally decide whether or not a majority of the employer's employees desire union representation. In any event, the decision as to union representation is not made on a "top-down" basis. It is employees, not the employer, that decide whether the union will represent them. They make the decision as to whether or not to sign written authorization cards. And again, if that decision is a product of unlawful coercion or employer assistance, the Board can abrogate the decision through the unfair labor practice provisions of the Act.

Indeed, the argument that this case involves "top-down organizing," is totally misplaced and represents a fundamental misunderstanding of what that term means. See Petitioners' Joint Brief at 11-13. Petitioners quote language from two Supreme Court cases noting that one of the major goals of the 1959 amendments to the Act was to limit "top-down" organizing campaigns. Id. (quoting Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 663 (1982); Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local

Union No. 100, 421 U.S. 616, 632 (1975)). However, Petitioners fail to describe what these cases continue on to say about what Congress intended the term to encompass: the coercion of employers and employees to recognize the union via secondary boycotts and picketing.

For example, in Connell, after stating that one of the aims of the 1959 amendments was to limit "top-down" organizing, the Supreme Court immediately continued, "Congress accomplished this goal by enacting § 8(b)(7), which restricts primary recognitional picketing, and by further tightening § 8(b)(4)(B), which prohibits the use of most secondary tactics in organizational campaigns." 421 U.S. at 632. Further, the Supreme Court indicated in another case that, in seeking to curb "top-down organizing":

> The use of picketing was of particular concern [to Congress] as a method of coercion in three specific contexts: where employees had already selected another union representative, where employees recently voted against a labor union, and where employees had not been given a chance to vote on the question of representation. Picketing in these circumstances was thought impermissibly to interfere with the employees' freedom of choice.

NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 347 (1978). Thus, although Congress' concern in enacting the 1959 amendments to the Act was unions' utilization of coercive tactics to obtain employer recognition, the tactics targeted were concrete: secondary boycotts and unlawful picketing. Petitioners' brief attempts to equate voluntary recognition agreements with secondary boycotts and unlawful picketing; however, characterizing voluntary recognition as the

equivalent to these two forms of "top-down organizing" is unsupported by case law, Congressional intent, and reality. Thus, voluntary recognition agreements and lawful union efforts to procure them do not violate the letter or the spirit of the Act.

8. *Amici* Automotive Aftermarket Suppliers Association, Heavy Duty Manufacturing Association, Motor and Equipment Manufacturers Association, Michigan Chamber of Commerce, and the Original Equipment Supplier's Association (OESA) argue that neutrality/card check agreements are "things of value" exchanged between employers and unions, and thus prohibited under Section 302 of the Act. See Brief of *Amici Curiae* of Automotive Aftermarket Suppliers Association, Heavy Duty Manufacturing Association, Motor and Equipment Manufacturers Association, Michigan Chamber of Commerce, and the Original Equipment Supplier's Association (OESA) at 24-25. It is respectfully submitted, however, that the *amici* misconstrue the purpose and scope of the protections codified in Section 302 when arguing that neutrality/card check agreements fall within the statute's parameters.

When Congress enacted this provision of the Act, it sought to "punish certain criminal activity in the conduct of union affairs, and thereby help to drive criminals from the labor movement." Brylane, L.P., 338 N.L.R.B. No. 65, at *2 n.4 (2002) (quoting Cent. States Southeast & Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098, 1110 (6th Cir. 1986)). Section

302's provisions were intended to prohibit specific abuses and corrupt practices that were "inimical to the integrity of the collective bargaining process," specifically: (1) bribery of employee representatives by employers during collective bargaining; (2) extortion of the company by employee representatives; and (3) abuse of power by union officers who had sole control over employee welfare funds. Arroyo v. United States, 359 U.S. 419, 425-26 (1959).

Although this statute is not limited on its face to monetary payments, courts frequently have applied the statute to transactions that are pecuniary in nature. See, e.g., United States v. Boffa, 688 F.2d 919 (3d Cir. 1982) (company's periodic provision of luxury cars for union local president's personal use constituted "things of value" under the Act); United States v. DeBrouse, 652 F.2d 383 (4th Cir. 1981) (union local president violated Section 302 by requesting that the employer pay $200 per week to the union president's friend); United States v. Roth, 333 F.2d 450 (2d Cir. 1964) (holding that an employer who provided an interest-free loan without collateral to an employee representative violated Section 302).

In contrast, courts and the NLRB have held that the term "things of value" does not encompass employer-union exchanges of information or agreements that facilitate the bargaining process. See Wyman-Gordon Co. v. NLRB, 397 F.2d 394, 396 (1st Cir. 1968), rev'd on other grounds, 394 U.S. 759 (1969) (holding that providing an "Excelsior" list of employee names and

addresses is not giving a "thing of value" to a union). Indeed, the NLRB and at least one district court have specifically declared that neutrality/card check agreements do not constitute a "thing of value" under Section 302. See, e.g., Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Resources, L.L.C., 299 F. Supp. 2d 461, 465 (W.D. Pa. 2003); Brylane, 338 N.L.R.B. at *2. In Brylane, Member Liebman responded to dissenting Member Cowan's assertion that a request for such agreements are a "thing of value," (as argued by the *amici*) stating that:

> [M]y colleague cites no authority for this novel proposition. In fact, Section 302 is a criminal statute that is aimed at the ills of bribery and extortion in labor relations, and thus it would not appear to be concerned at all with this type of organizational activity.

338 N.L.R.B. at *2 (citation omitted). Similarly, in Sage Hospitality, the district court held that the employer-union neutrality agreement—which provided for union access to employees, lists of employee names and home addresses, and a card check—did not violate Section 302. 299 F. Supp. 2d at 465. The court went on to hold that the argument that such agreements constituted "things of value" was "meritless," and such reading of the statute was "clearly out of context and irrelevant." Id. In sum, the *amici*'s argument that the neutrality/card check agreement at issue in the instant case violates Section 302 is inconsistent with Congressional intent and case law of both the Board and federal courts.

CONCLUSION

For the foregoing reasons, the Board should not abolish, or amend, the voluntary recognition bar and uphold the Regional Directors dismissal of the decertification petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was sent by facsimile and first-class mail on July 29, 2004, on the attached service list.

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Attachment

Atherholt and Dana and UAW, Case 8-RD-1976
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